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No. 03-1004

In the Supreme Court of the United States

AMMEX, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

After the Court of International Trade issued a decision holding that the fact that gasoline and diesel fuel are "unidentifiable fungibles" does not remove them from the category of "duty-free merchandise" that may be sold under 19 U.S.C. 1555(b), the United States Customs Service ruled that petitioner's gasoline and diesel fuel do not satisfy the definition of "duty-free merchandise" in 19 U.S.C. 1555(b)(8)(E) because they are subject to federal taxes. The questions presented are:

1. Whether the ruling of the Customs Service contravenes the Court of International Trade's interpretation of a federal statute.

2. Whether the decision of the Court of International Trade is a res judicata bar to the ruling by the Customs Service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 334 F.3d 1052. The opinion of the Court of International Trade (Pet. App. 12a-23a) is reported at 193 F. Supp. 2d 1325. An earlier opinion of the Court of International Trade (Pet. App. 26a-41a) is reported at 116 F. Supp. 2d 1269.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2003. A petition for rehearing was denied on October 7, 2003 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on January 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves provisions of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, which is codified in Chapter 4 of Title 19 of the United States Code. Section 1555(b)(1) of Title 19 provides that "duty-free sales enterprises may sell and deliver for export from the customs territory duty-free merchandise in accordance with this subsection and such regulations as the Secretary may prescribe to carry out this subsection." The term "duty-free merchandise" is defined in Section 1555(b)(8)(E) as "merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory." Section 1557(a)(1) provides, in part, that "[a]ny merchandise subject to duty * * * , with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse * * * [and] may be withdrawn for exportation." A "bonded warehouse" is a building, or part of a building, used for "the storage of imported merchandise." 19 U.S.C. 1555(a).

2. Petitioner operates a duty-free store in Detroit, Michigan, that qualifies as both a "duty-free enterprise" and a "bonded warehouse." The store is adjacent to the Ambassador Bridge, which connects the United States and Canada. In January 1994, petitioner requested approval from the United States Customs Service (Customs)[1] to sell gasoline and diesel fuel on a duty-free basis. In June 1994, Customs issued Headquarters Ruling (HQ) 225287, which determined that duty-free

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[1] The Customs Service is now the Bureau of Customs and Border Protection.

gasoline and diesel fuel may not be sold at a duty-free store under 19 U.S.C. 1555(b). The basis for the ruling was that "unidentifiable fungibles" like gasoline and diesel fuel could not be marked or otherwise identified, and that Customs would therefore have no practical way of ensuring that such merchandise was declared when vehicles returned to the United States. In February 1998, Customs reaffirmed HQ 225287 in HQ 227385. Pet. App. 2a-3a, 27a-29a, 44a-52a, 53a-65a.

3. Petitioner challenged HQ 225287 and HQ 227385 in the Court of International Trade. Holding that the Customs rulings violated 19 U.S.C. 1557(a)(1), the court granted petitioner's motion for judgment on the agency record. Because Section 1557(a)(1) permits "any merchandise subject to duty" to be deposited in a bonded warehouse and withdrawn for exportation unless the merchandise constitutes "perishable articles" or "explosive substances," and because gasoline and diesel fuel are neither perishable articles nor explosive substances, the court concluded that Customs' exception for "unidentifiable fungibles" had no basis in the statute. Pet. App. 26a-41a.

4. In September 2000, Customs granted petitioner's request to allow the sale of gasoline and diesel fuel at its duty-free store. The next month, petitioner requested certification from Customs that the gasoline and diesel fuel were exempt from federal taxes. Customs forwarded petitioner's request to the Internal Revenue Service (IRS), which issued an informational letter stating that Section 4081 of the Internal Revenue Code imposes a tax on the entry into the United States of any taxable fuel, including gasoline and diesel fuel, for consumption, use, or warehousing. On the basis of the IRS letter, Customs determined that it could not lawfully permit petitioner to sell gasoline and diesel fuel

on a duty- and tax-free basis, because 19 U.S.C. 1555(b)(8)(E) defines "duty-free merchandise" as merchandise on which no federal duty or federal tax has been assessed "pending exportation from the customs territory." Accordingly, in November 2001, Customs revoked its approval. Pet. App. 4a-5a, 8a, 14a-15a, 95a-100a, 101a-114a.

5. Petitioner filed a motion in the Court of International Trade for an order to show cause why Customs should not be held in contempt. The court denied the motion. It held that Customs' revocation of approval to sell gasoline and diesel fuel on a duty- and tax-free basis did not violate the court's earlier decision, because the parties had merely assumed that the gasoline and diesel fuel qualified as "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E) and the court did not address that issue. The court also rejected petitioner's claim that res judicata precluded Customs from revoking its approval. Pet. App. 12a-23a.[2]

6. The court of appeals affirmed. Pet. App. 1a-11a.

The court first held that res judicata did not preclude Customs from revoking its approval. Pet. App. 5a-11a. Quoting this Court's decision in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981), the court of appeals observed that, under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Pet. App. 6a. Citing this Court's decision in

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[2] Approximately three months after the Court of International Trade denied petitioner's request to hold Customs in contempt, petitioner filed a separate challenge to the revocation of authorization in the same court. See *Ammex, Inc.* v. *United States*, No. 02-0361. That case is still pending.

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322, 326 n.5 (1979), the court then noted that res judicata requires proof of three elements; that the parties are identical or in privity; that the first suit proceeded to a final judgment on the merits; and that the second claim is based on the same set of transactional facts as the first. Pet. App. 6a. The court concluded that the first two elements were established but that petitioner could not establish the third element, because the two claims were not based on the same set of transactional facts. *Id.* at 6a-10a. Although "the ultimate effect of both claims was to determine whether [petitioner] may sell gasoline and diesel fuel duty-free," the court explained, the claims are "sufficiently different," because the first claim was that Customs' "unidentifiable fungibles" rulings were inconsistent with 19 U.S.C. 1557(a)(1) and the second claim challenged Customs' determination that the taxability of petitioner's gasoline and diesel fuel under 26 U.S.C. 4081 precludes them from qualifying as "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(D). Pet. App. 8a-10a.

The court of appeals also held that the Court of International Trade did not abuse its discretion in refusing to hold Customs in contempt for revoking its approval. Pet. App. 11a. The court explained that "[a]n agency may change its policy position based on a reasonable explanation," and the IRS ruling on the tax issue "provided such a basis." *Ibid.*

ARGUMENT

The decision of the court of appeals is both fact-bound and correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner contends that Customs' revocation of approval to sell gasoline and diesel fuel on a duty- and tax-free basis violated the principle that "[a]dministrative agencies may not contravene a judicial statutory construction." Pet. 12. For that reason, petitioner says (Pet. 12-14), the court of appeals' decision is inconsistent with this Court's statement in *Neal* v. *United States*, 516 U.S. 284 (1996), that, once this Court has determined a statute's unambiguous meaning, it will "adhere to [its] ruling under the doctrine of *stare decisis*" and "assess an agency's later interpretation of the statute against that settled law." *Id.* at 295. Petitioner is mistaken. The principle on which it relies is not applicable here, and the court of appeals' decision does not conflict with *Neal*.

The question of statutory interpretation decided by the Court of International Trade was whether "unidentifiable fungibles" like gasoline and diesel fuel are excepted from the category of "duty-free merchandise" that duty-free enterprises are permitted to sell under 19 U.S.C. 1555(b). Pet. App. 30a-35a, 38a-41a. In holding that they are not, the court relied on 19 U.S.C. 1557(a)(1), which allows any merchandise, with two exceptions not applicable here, to be deposited in, and withdrawn from, bonded warehouses. *Ibid.* Customs' decision to revoke approval not only did not contravene the court's decision on that question of statutory interpretation, it had nothing to do with that question. Customs' decision was instead based on a determination that petitioner's gasoline and diesel fuel did not satisfy the definition of "duty-free merchandise" in 19 U.S.C. 1555(b)(8)(E), because they are subject to federal tax. That this is an entirely separate issue was recognized by both of the courts below (Pet. App. 8a-10a, 17a-22a),

including the one whose decision Customs supposedly contravened.

2. Petitioner also contends (Pet. 14-20) that the court of appeals misapplied principles of res judicata. In particular, it contends (Pet. 15-20) that the basis for Customs' revocation of its approval—that petitioner's gasoline and diesel fuel were taxable and therefore not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)—is a legal theory that could, and should, have been raised either in the Headquarters Rulings themselves or in the Court of International Trade when petitioner challenged the rulings. This contention was rejected by both the trial court and the court of appeals, and it does not warrant further review.

As an initial matter, petitioner does not contend that the court of appeals applied an incorrect legal standard. Compare Pet. App. 6a (court of appeals identifies three elements for claim of res judicata) with Pet. 16 (petitioner identifies same three elements). Its contention, at bottom, is that the court of appeals applied a correct legal standard incorrectly. A petition for a writ of certiorari is "rarely granted," however, when the asserted error consists of "the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, petitioner is mistaken in its contention that the court of appeals' fact-specific decision is erroneous. An agency is not required to raise every possible justification for a particular decision in its administrative ruling or in defending a ruling against a legal challenge, and res judicata does not bar an agency from exercising its regulatory authority to consider additional legal or factual issues if the agency decision is set aside.

The court of appeals correctly held (Pet. App. 6a-10a) that the two claims at issue here are based on different

"transactional facts," and that petitioner therefore cannot satisfy the third element of res judicata. In the first claim—the challenge to Customs' rulings that gasoline and diesel fuel are "unidentifiable fungibles" and thus cannot be sold in duty-free stores—petitioner contended, on the sole basis of the administrative record, that the rulings violated 19 U.S.C. 1557(a)(1). The second claim—petitioner's challenge to Customs' determination that petitioner's gasoline and diesel fuel are taxable and thus are not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)—involved a different decision, based on a different administrative record, that was made after petitioner's first claim had been resolved by the Court of International Trade. Since the two claims concerned different administrative decisions, and were based on different administrative records, they were not "based on the same set of transactional facts" (Pet. 16), and there is no res judicata bar. Cf. *FTC* v. *Raladam Co.*, 316 U.S. 149, 151 (1942) (second administrative finding of unfair competition not precluded by vacatur of first finding of unfair competition, because two cases arise "out of different proceedings" and present "different facts and a different record").

Contrary to petitioner's contention, the Customs decision that is the subject of the second claim involves "new fact[s]," not merely "a new legal theory" that could have been raised in the Headquarters Rulings or the Court of International Trade. Pet. 18, 19. After the trial court rejected Customs' ruling that "unidentifiable fungibles" cannot be sold in duty-free stores and Customs granted petitioner authority to sell duty-free gasoline and diesel fuel, petitioner asked Customs to certify that the merchandise was exempt from federal taxes. Customs, which does not interpret the tax laws,

forwarded petitioner's request to the IRS, which issued an informational letter stating that the gasoline and diesel fuel were subject to taxes. These "subsequent events" (Pet. App. 20a) cannot reasonably be characterized as the equivalent of a new legal theory. Since the challenge to the Headquarters Rulings had been litigated on "the presumption that the gasoline and diesel fuel at issue qualified as 'duty-free merchandise'" (*ibid.*), the IRS letter and the information in it are new facts, which were not part of the basis for the first claim. See also *id.* at 11a ("IRS ruling" provided basis for Customs to change its position on whether petitioner could sell gasoline and diesel fuel on duty- and tax-free basis).

Not only was Customs not obligated to defend its Headquarters Rulings in the Court of International Trade on the alternative ground that petitioner's gasoline and diesel fuel are taxable (and therefore not "duty-free merchandise" under 19 U.S.C. 1555(b)(8)(E)), it is unlikely that Customs "could have raised" that theory (Pet. 19) even if it had desired to do so. Review of Customs' rulings was based on the administrative record as it existed at the time of the rulings, see Pet. App. 30a (citing 5 U.S.C. 706 and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971)), and the fact that petitioner's merchandise was subject to federal taxes was not part of that record.[3] Even if it had been, moreover, the

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[3] Petitioner contends (Pet. 5, 18) that the tax issue was part of the administrative record, but as the court of appeals correctly recognized in rejecting that claim, the portion of the record identified by petitioner (see Pet. App. 46a) "deal[s] with forwarding warehouse entry documents to the IRS, and not the question of whether federal tax was due on the gasoline and diesel fuel" (*id.* at 9a).

court would have been prohibited from upholding Customs' rulings on any alternative ground, because an administrative decision must stand or fall on the grounds articulated by the agency, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943), and the taxability of petitioner's gasoline and diesel fuel was not one of those grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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